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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 259.

THOMAS CONNOLLY,
Plaintiff in Error,
vs.
UNION SEWER PIPE COMPANY,
Defendant in Error.

WILLIAM E. DEE,
Plaintiff in Error,
vs.
UNION SEWER PIPE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION TO DISMISS WRITS OF ERROR
AND
BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
of Counsel.

BARNARD & MILLER, PRINT.

IN THE

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In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION TO DISMISS WRITS OF ERROR.

Comes now the defendant in error, by its counsel appearing in that behalf, and moves the court to dismiss the writs of error in the above entitled causes for want of jurisdiction, because the Circuit Court of Appeals for the Seventh Circuit has exclusive jurisdiction to review by writ of error the judgments entered by the Circuit Court in the above entitled causes.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
of Counsel.

BRIEF IN SUPPORT OF MOTION TO DISMISS WRITS OF ERROR.

Writs of error were allowed direct to this court upon the petition of the learned counsel for plaintiffs in error, presumably for the alleged reason that it is shown by the record that a law of the State of Illinois is in contravention of the Constitution of the United States.

In their notice of special defenses the defendants charged that the plaintiff was a trust, and doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an Act of the Legislature of the State of Illinois, entitled, "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdeameanors and prescribing punishment thereof and matters connected therewith, approved June 20th, 1893." (Trans. p. 34.)

Each of the defendants plead this act "in defense to this action and the whole thereof." This statute is a part of the Criminal Code of the State of Illinois. It is under the tenth and last section of the act that the defendants interpose their special defense, to wit: "Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment."

In support of plaintiff's motion that the jury be directed to return a verdict against the defendants, several causes were assigned. The eighth is as follows:

"The Statute of the State of Illinois, of 1893, is unconstitutional and void. It is prohibited by the constitution of the State of Illinois of 1870. It is prohibited by the Fourteenth Amendment of the Constitution of the United States as being special legislation. It has not the essential principles of equality, as required by said Constitution."

A further, and the principal cause assigned was that, "under all the evidence and proceedings in this case, the defendant has not made good its defenses and therefore the verdict of the jury should be for the plaintiff." (Trans., pp. 204-5.)

The court in its opinion, which is printed in the record (pp. 228-9), held that the act of 1893 was in contravention of both the Federal and State Constitutions.

While we admit that the claim was made in the Circuit Court that the Statute of 1893 was invalid under the Constitution of the United States, we respectfully submit that the claim so made was not controlling, nor was the ruling of the court thereon at all decisive of the rights of the parties.

The defense made by the defendants in the Circuit Court was threefold. First: That the plaintiff was a trust combination of the capital of divers persons and corporations, carrying on business in the States of Ohio and Illinois in the manufacture and sale of certain articles of merchandise; that the action was brought to recover the price of such articles of merchandise, and that such trust combination was contrary to the common law.

Second: That the plaintiff was a combination in the form of a trust in restraint of trade and commerce among several states, contrary to the provisions of the Act of

Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and that the action was brought to recover the price of certain articles of merchandise sold to the defendant by the plaintiff, then and there doing business as such combination, in violation of the provisions of said act.

Third: That the plaintiff was an organization of certain persons and corporations contrary to the Statute of the State of Illinois of July, 1893, and that the action was brought to recover the price of certain articles of merchandise sold to the defendant by the plaintiff, and said act is pleaded as a defense to the entire cause of action.

It is true that the court held against the defendants upon each of the legal propositions, and it is equally true that the court would have reached the same conclusion if the validity of the State Statute had not been incidentally challenged as in contravention of the Constitution of the United States. It would, therefore, seem that under the decisions of this court the writs of error should be dismissed.

We will cite but few authorities in support of our motion.

Carey v. *Railway Company,* 150 U. S., 170.

This was a motion by the appellee to dismiss the appeal. The court, speaking by the Chief Justice, said:

> "The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction, (the judgments of the latter being subject to the supervisory power of this court through the writ of *certiorari* as provided) and the act has been uniformly so construed

> and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court."

Also (p. 181):

> "In order to hold this appeal maintainable as within the second of the above named classes (the fourth class in the enumeration of the statute), the construction or application of the Constitution of the United States must be involved as controlling, although on error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution."

In *Cook County* v. *Canal & Dock Co.*, 138 U. S., 653, the court held that:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In *Green* v. *Mills*, 69 Fed. Rep., 857, it was contended by the appellee that the Circuit Court of Appeals had not jurisdiction, for the reason that, under the law, the appeal should have been taken directly to the Supreme Court. After citing several cases as bearing upon the direct question involved, the Circuit Justice said:

> "In view of these and other cases, we are of opinion that where the jurisdiction is not in issue, but the question of the constitutionality of a state law is raised, and must necessarily be decided in the disposition of the case, there the case on final decree should be taken direct to the Supreme Court."

In the present cases the question of the constitutionality of a state law, as being in contravention to the Federal Constitution, was not necessarily involved in the disposition of the case—this question was neither controlling nor necessary. Had the Circuit Court entirely eliminated

this question from its opinion, the result would have been precisely the same.

Louis Loeb, Plff. in Error, v. *Trustees of Columbia Township, etc.,* decided at the present term of court and reported in the Advance Sheets, Number 5, p. 174, appears to be the latest authority bearing upon the question under discussion. The suit was upon bonds issued by the Township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits. The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the Township. In the argument upon the demurrer three points were made and decided by the court. The first and second were ruled in favor of the plaintiff. The third, as stated in the opinion, is as follows:

> "That the act contravened the provisions of the Constitution of the United States, and therefore the bonds were invalid."

Upon this proposition the court held with the defendant and sustained the demurrer. The plaintiff electing not to plead further, judgment was rendered for the defendant. It is stated in the opinion that "the first question to be considered is one of the jurisdiction of this court to proceed upon writ of error directly to the Circuit Court." The controlling question in the court below was the invalidity of the state statute as in contravention of the Federal Constitution, under the authority of which the bonds in controversy were issued. This was the sole ground for sustaining the demurrer and dismissing the petition. As affecting the jurisdiction of this court, it was asserted by the defendant in error that the record did not show that the claim of the invalidity of the State Statute was made in the Circuit Court, except as it ap-

peared in the opinion of the court, and that such opinion was no part of the record. After a full consideration of this proposition, and the citation of many cases, the court, speaking by Mr. Justice HARLAN, said:

> "For the reasons we have given, it must be held that in a case brought here from the Circuit Court the opinion regularly filed below and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a state statute upon which the judgment necessarily depended in whole or in part was in contravention of the Constitution of the United States."

This opinion would seem to be in harmony with *Carey* v. *Railway Company,* 150 U. S., *supra,* in which this court held that, to maintain the jurisdiction of this court, by direct appeal or writ of error, it must appear that the construction or application of the Constitution of the United States must be involved and, necessarily, controlling.

Upon the motion of the defendant in error the three matters of special defense were stricken out, and, while it is true that the Circuit Court held that the Statute of Illinois of 1893 was invalid, as being in contravention of the Constitution of the United States, this by no means was the controlling reason in the mind of the court. Upon other grounds, and for other causes, the court entered an order striking out the special defenses and directing the jury to return a verdict in favor of the plaintiff.

Defendant in error, therefore, respectfully submits that the writs of error in these respective cases should be dismissed.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 259.

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WILLIAM E. DEE,
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UNION SEWER PIPE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF CASE.

At the March Term, A. D. 1897, of the Circuit Court for the Northern District of Illinois the Union Sewer Pipe Company, a corporation organized under the laws of the State of Ohio, commenced its two several actions in assumpsit against the plaintiffs in error, Thomas Connolly and William E. Dee. The cause of action against Thomas Connolly was upon two promissory notes, the one dated December 15, 1894, and the second January 15, 1895. The action against William E. Dee was for goods sold and delivered in the month of July, 1896. The declarations were in the usual form in actions in assumpsit, with affidavit of the amounts due in accordance with

the procedure in such cases in the State of Illinois. The defendant, Connolly, filed his plea of general issue, with notice of special defenses.

(1) That the plaintiff was organized for, and was a trust combination or monopoly contrary to the provisions of the common law.

(2) That the plaintiff was a trust, combination, or corporation, contrary to the Federal Statutes of 1890.

(3) That said plaintiff was a corporation organized for the purpose of carrying on a trust or monopoly, contrary to the Statutes of the State of Illinois of 1893, and that therefore all its contracts are illegal and void.

Defendants also filed notices of set-off—

(1) Treble the amount of the actual damages sustained, allowed by Act of Congress dated June 2, 1890, in the aggregate.....$56,970.41

(2) For actual damages sustained by the defendant by reason of the plaintiff's violation of the Statute of the State of Illinois.....$17,323.48

(3) For money had and received by plaintiff of the defendant, contrary to law, the same amount.

The defendant, William E. Dee, also filed his plea of general issue with notices of special defenses, substantially the same as those interposed by the defendant, Connolly.

In the bill of particulars of set-off, filed by this defendant, he claims:

(1) Treble the amount of the actual damages under the Act of Congress of June 2, 1890.....$76,340.00

(2) Actual damages sustained by reason of the plain-

tiff's violation of the Anti-trust Act of the Legislature of the State of Illinois.....$23,780.00

The causes came on for hearing January 22, A. D. 1900. By stipulation in open court both causes were submitted to one jury, separate verdicts to be returned, and with the further stipulation that, if either party should desire a bill of exceptions, the same evidence might be used as a bill of exceptions in each and in both cases.

The Union Sewer Pipe Company was organized under the laws of the State of Ohio, but its constitution and by-laws are omitted from the record, and there is no written evidence of the object and purpose of the organization of the corporate body.

On or about the 15th day of February, 1893, said company contracted with several corporations and copartnerships engaged in the manufacture of sewer pipe, for the purchase and sale of all the pipe manufactured by said parties for a term of years expiring the last day of December, 1900. The manufacturers agreed to make and keep in stock at their respective works a good and sufficient supply of socket and ring pipe, and to deliver the same to the Union Sewer Pipe Company free on board of cars at their respective factories. The price and manner of payment of the pipe delivered under the contract, are fixed and determined by the terms thereof. The Union Company agreed to order the pipe as fast, and in such manner, and at such times, as the demands of the market may require. There is no other limitation put upon the product of the several factories, and the Union Company is at liberty to sell the pipe at the best prices obtainable in the market. A full copy of the contract is

made a part of the transcript of record (pp. 128 to 132, inclusive).

Prior to 1893 both of the plaintiffs in error had for many years been dealing in sewer pipe in the city of Chicago, and elsewhere in the State of Illinois. During a part of the time Connolly was both a manufacturer and dealer. Their purchases of pipe were not confined to the manufactories in the Akron district, but it appears that they bought and sold pipe made in other localities, and by other manufacturers. After its organization their purchases of the Akron pipe were made exclusively of the Union Sewer Pipe Company, but the terms and conditions of their purchases prior to August 20, 1895, does not appear in the evidence.

On the 20th day of August, A. D. 1895, each of the plaintiffs in error entered into written contracts with the Union Sewer Pipe Company. The contracts were alike in all their terms, provisions, and conditions. The Union Sewer Pipe Company agreed to sell and deliver free on board of cars at its factories, sewer pipe of different sizes and dimensions, at prices named in said contracts. Plaintiffs in error, and each of them, in consideration of the prices named and certain rebates to be allowed, agreed to purchase and handle exclusively the sewer pipe "handled and sold" by the defendant in error, except when it was unable to furnish and fill all the orders for sewer pipe that the plaintiffs in error might from time to time require. These sales were made upon certain discounts of the Western price list specially noted in the contract, and the plaintiffs in error also agreed to sell the pipe in the city of Chicago at certain discounts from said Western price list. It was further provided that the contract might be terminated by either party upon

thirty (30) days' written notice. Copy of this contract is made a part of the transcript (pp. 149, 150).

In this contract no reference is made to any particular brand of pipe, nor is it confined to pipe manufactured within the "Akron District," but, on the contrary, the contract is for any pipe "handled and sold" by the Union Sewer Pipe Company.

It is claimed by the plaintiffs in error that by reason of the specifications required by the Department of Public works of the City of Chicago in all contracts for the construction of public sewers, no pipe could be received, except "standard Akron pipe," and that all other brands and makes of pipe would be rejected. It is in evidence, however, that defendant's witness, William D. Kent, was appointed commissioner of public works early in the year 1895, and that he immediately caused tests to be made at the University of IIllinois of the quality of the several kinds of sewer pipe then in market in the city of Chicago, and that as a result of such tests it was found that the pipes of seven or eight different manufacturers were of equal quality and value, and thereupon he gave directions that either of such brands of pipe should be thereafter used in the construction of public sewers. It appears further from the evidence of the plaintiff in error, Connolly, that prior to this time, as a matter of fact, several other kinds of pipe were of equal quality with the Akron pipe, and that the preference shown the Akron pipe, was the result of a combination between dealers and inspectors. Also, that for years preceding and following the organization of the Union Sewer Pipe Company, other than Akron pipe had been used in the construction of public sewers in the city of Chicago, notably, a large amount of pipe from the Columbus Ohio factory, which was not in the Akron district.

The action against plaintiff in error, Thomas Connolly, was brought upon two promissory notes given by him to the Union Sewer Pipe Company, but there is no evidence in the record that these notes were given for Akron, or any other brand of pipe. The consideration for which these notes were given nowhere appears in the record.

The action against plaintiff in error, William E. Dee, is upon an open account for goods sold and delivered in the month of June, A. D. 1896. The claim made by this plaintiff in error that he could dispose of no other pipe than that of the Akron brand in the city of Chicago, after the execution of his contract of 1895, is contrary to the evidence. As the contract provided for its termination upon thirty (30) days' notice, he could at any time after its execution have given the notice, and thereafter purchased pipe of whomsoever he pleased, and of any brand or make. He admitted on the trial that the pipe for which this action was brought was delivered to him under the contract, and that he had sold and disposed of the same, and it appears that no defense whatever was interposed in either of the cases, except that the Union Sewer Pipe Company was an unlawful combination contrary to the common and statutory law of the State of Illinois.

At the close of the evidence, upon the request of the plaintiff, the court charged the jury to return a verdict for the plaintiff in each action, and thereupon verdicts were returned, and judgments entered, in favor of the plaintiff. An order was entered of record allowing the defendants to prosecute jointly a writ of error to this court, and to "prosecute said writ of error jointly upon the one record of said consolidated causes."

Believing that the writs of error should have been taken

to the Circuit Court of Appeals, the defendant in error has filed in each case, its motion to dismiss the writs of error.

If this motion be denied, then it follows, under the ruling of this court, that "all other questions will be open to determination," and we therefore submit our brief and argument upon the entire record.

BRIEF.

I.

THERE IS NO EVIDENCE IN THE RECORD THAT THE PLAINTIFF IS OR HAS BEEN, SINCE THE FIRST DAY OF JANUARY, 1893, AN UNLAWFUL COMBINATION OF DIVERS PERSONS AND CORPORATIONS, ORGANIZED FOR THE PURPOSE OF UNLAWFULLY "CARRYING OUT RESTRICTIONS IN TRADE CONTRARY TO THE COMMON LAW, OR CONTRARY TO THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED: 'AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRICTIONS AND MONOPOLIES, OR CONTRARY TO THE ACT OF THE LEGISLATURE OF THE STATE OF ILLINOIS, ENTITLED: AN ACT TO DEFINE TRUSTS AND CONSPIRACIES AGAINST TRADE, ETC.,' APPROVED JUNE 20, 1893," AS CHARGED IN DEFENDANTS' NOTICES OF SPECIAL DEFENSES.

II.

THE CIRCUIT COURT DID NOT ERR IN SUSTAINING PLAINTIFF'S MOTION TO STRIKE OUT THE DEFENDANTS' NOTICES OF SET-OFF.

(a) Unliquidated damages, growing out of a tort, cannot be set off in an action *ex contractu*.

(b) Defendants' bill of particulars of set-off, filed under order of court, is for treble damages under the Federal Statute of July 2, 1890, and for damages by reason of plaintiff's alleged violation of the Statute of the State

of Illinois, of July 1, 1893, defining trusts and conspiracies. (Trans., p. 38.) The claim of such damages is not permissible either as a defense, or set-off, to the plaintiff's demand.

Robison v. *Hibbs,* 48 Ill., 408.
Hubbard v. *Rogers,* 64 Ill., 434-7.
Evans v. *Hughey,* 76 Ill., 115.
Clause v. *Bullock Printing Co.,* 118 Ill., 612.
United States v. *Buchanan,* 8 How., 83.
Dushane v. *Benedict,* 120 U. S., 630-48.
Scammon v. *Kimball,* Circuit Court, N. D. of Illinois, 5 Biss., 431.

III.

THE CIRCUIT COURT DID NOT ERR IN DIRECTING THE JURY TO RETURN A VERDICT FOR THE PLAINTIFF.

(a) The contracts of the defendant in error with the several manufacturers of sewer pipe in the "District of Akron" and with the plaintiffs in error, respectively, are not inhibited by the Act of Congress of July 2, 1890, entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies."

(b) There is nothing in the evidence to indicate any intention to put a restraint upon trade or commerce among the several states.

(c) It does not appear that any agreements or contracts made by the defendant in error, and relating to the conduct of its business, are in restraint of inter-state commerce.

U. S. v. *E. C. Knight Co.,* 156 U. S., 1.
Addyston Pipe & Steel Co. v. *U. S.,* 175 U. S., 211.
Hopkins v. *U. S.,* 171 U. S., 578.
In re Green, 52 Fed. Rep., 113.

(d) The Statute of the State of Illinois, entitled: "An Act to define trusts and conspiracies against trade," approved June 20, 1893, does not impair the validity of the contract between the parties.

1. Defendant in error is a corporation, organized under the laws, and is a citizen of the State of Ohio. The contract for the sale of the sewer pipe was made in the State of Ohio, and the property was delivered to plaintiffs in error free on board of cars at Akron, Ohio, and therefore the Statutes of the State of Illinois cannot be plead as a defense. The title to the property passed from the vendor to the vendee on delivery.

Parsons on Contracts, page 754.
Adams v. *Coulliard,* 102 Mass., 167.
Roundtree v. *Baker,* 52 Ill., 241.
Schlee v. *Guckenheimer,* 179 Ill., 593-7.
Liverpool Steamship Co. v. *Insurance Co.,* 129 U. S., 397.

2. The Act of 1893 defines trusts, conspiracies, etc., but does not forbid, or prohibit the entering into, or forming such trusts or conspiracies. Nothing is prohibited, or commanded therein, and therefore there can be no violation thereof.

The State Statute of 1893 is void as being in contravention of Article 2, Section 2, of the Constitution of the State of Illinois.

Ritchie v. *People,* 155 Ill., 98.
Harding v. *People,* 160 Ill., 459-64-65.
Braceville Coal Co. v. *People,* 147 Ill., 66-70.
Millett v. *People,* 117 Ill., 294.
Frorer v. *People,* 141 Ill., 171.
Cooley on Constitutional Limitations, Sec. 393.

State legislation of this character is also inhibited by the Fourteenth Amendment to the Constitution of the United States.

Smyth v. *Ames*, 169 U. S., 522.
Duncan v. *Missouri*, 152 U. S., 377-82.
Railway Co. v. *Ellis*, 165 U. S., 150.
Yick Wo v. *Hopkins*, 118 U. S., 356-73.
Ex parte Virginia, 100 U. S., 339-44.
In re Grice, 79 Fed. Rep., 627-39-41.

IV.

IT IS NO DEFENSE TO AN ACTION FOR GOODS SOLD AND DELIVERED, THAT PLAINTIFF IS A MEMBER OF AN ILLEGAL TRUST OR COMBINATION TO INTERFERE WITH THE FREEDOM OF TRADE AND COMMERCE, SINCE THE ILLEGALITY OF THE COMBINATION IS COLLATERAL TO THE CONTRACT OF SALE, AND CANNOT TAINT IT WITH ILLEGALITY, OR MAKE IT CONTRARY TO PUBLIC POLICY.

National Distilling Co. v. *Cream City Importing Co.*, 56 N. W. Rep., 864.
Brooks v. *Martin*, 2 Wallace, 70-81.
Planters Bank v. *Union Bank*, 16 Wallace, 483-99.
Dennehy v. *McNulta*, 86 Fed. Rep., 825-29.
Jackson et al. v. *Bricklayers Assn.*, 53 Ohio, 308.
Greenhood on Public Policy, Rule 108 and 109.
Norton v. *Blinn*, 39 Ohio St., 145.
Bishop v. American Preserver Company
157 Ills. 284 - 330.

V.

UNDER ALL THE EVIDENCE AND PROCEEDINGS IN THESE CASES, THE COURT DID NOT ERR IN DIRECTING THE JURY TO RETURN A VERDICT FOR THE PLAINTIFF.

(a) It is shown by the evidence, that but six manufacturers of sewer pipe became interested in the organization of the Union Sewer Pipe Company and entered into contracts for the sale of their product, out of the seventy-five to one hundred corporations and copartnerships engaged in the same business in the several states.

(b) That the product of the six constituent manufacturers was not reduced in quantity, nor was the market price increased.

(c) That the defendant in error did not, and could not control the market price of the product, either in Chicago, or elsewhere—there were several other manufacturers in competition with the defendant in error in all the markets.

(d) The contracts between the defendant in error and the manufacturers within the "Akron District," did not operate either in restraint, or partial restraint of trade, nor did they amount to a conspiracy between the parties, to control prices, by creating a monopoly.

Oregon Steam Navigation Co. v. *Windsor*, 20 Wallace, 64.
Gibbs v. *Baltimore Gas Co.*, 130 U. S., 396-405.
Dolph v. *Troy Laundry & Machinery Co.*, 28 Fed. Rep., 553.
In re Green, 52 Fed. Rep., 104.
Coquard v. *National Linseed Oil Co.*, 171 Ill., 484.
Brown v. *Rounsavell*, 78 Ill., 589.
Lynn v. *Sigsbee*, 67 Ill., 80.
Hursen v. *Gavin*, 162 Ill., 377-82.
Cook v. *Meyers*, 166 Ill., 289.

Anson v. Iron & Steel Summary 113 Ill. 618-630

ARGUMENT.

I.

THERE IS NO EVIDENCE IN THE RECORD THAT THE PLAINTIFF IS OR HAS BEEN, SINCE THE FIRST DAY OF JANUARY, 1893, AN UNLAWFUL COMBINATION OF DIVERS PERSONS AND CORPORATIONS, ORGANIZED FOR THE PURPOSE OF UNLAWFULLY "CARRYING OUT RESTRICTIONS IN TRADE CONTRARY TO THE COMMON LAW, OR CONTRARY TO THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED: 'AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRICTIONS AND MONOPOLIES, OR CONTRARY TO THE ACT OF THE LEGISLATURE OF THE STATE OF ILLINOIS, ENTITLED: 'AN ACT TO DEFINE TRUSTS AND CONSPIRACIES AGAINST TRADE, ETC.,' APPROVED JUNE 20, 1893," AS CHARGED IN DEFENDANTS' NOTICES OF SPECIAL DEFENSES.

On the 15th day of December, A. D. 1894, the plaintiff in error, Thomas Connolly, made and executed his certain promissory note whereby he promised to pay the Union Sewer Pipe Company, ninety (90) days after date, the sum of $1,850.36 at the First National Bank, city of Chicago; also on the 15th day of January, A. D. 1895, his certain other promissory note for the sum of $1,289.56, payable to the defendant in error ninety (90) days after date. (Trans., p. 56.) For the recovery of the amount due upon said notes, this action was brought. The execution of the notes was admitted and their validity is not challenged either by special pleas or evidence.

The action against plaintiff in error, William E. Dee, is in assumpsit for goods sold and delivered. Prior to the trial the plaintiff by leave of court amended its declaration by striking out the special count and substituting therefor the common counts. (Trans., p. 42.)

On the trial the defendant admitted the receipt of goods to the whole amount of the claim, to wit: $2,389.26. (Trans., 60-1.) All of the goods were delivered in the month of June, 1896.

On the 20th day of August, A. D. 1895, each of the plaintiffs in error entered into a certain written contract with the defendant in error, full copies of which are made a part of the transcript (pp. 148 and 176). The "Union Sewer Pipe Company, City of Akron, County of Summit, and State of Ohio," is made party of the first part, and the plaintiffs in error, respectively, party of the second part. By the terms of the contract, the party of the first part agrees to sell and deliver to party of the second part sewer pipe free on board cars at its factories at certain discounts of the Western Price List.

The party of the second part agrees to purchase and handle exclusively the sewer pipe handled and sold by the party of the first part, except when said party is unable to furnish and fill the orders for sewer pipe that they, the second party, may make. The party of the second part does not agree to purchase or receive any given amount of sewer pipe, nor are they required to accept any amount whatever. No particular brand or quality of pipe is specified, but only the pipe "handled and sold by the party of the first part." It is further provided that either party may terminate the contract upon thirty days' written notice. This contract was put in evidence by the

plaintiffs in error, and its validity is conceded. It is not tainted with the virus of unlawful combination or monopoly.

Plaintiffs in error also put in evidence a certain contract between the defendant in error and certain manufacturers of sewer pipe in the vicinity of the city of Akron, State of Ohio. (Trans., 128-132.) By the terms of this contract the manufacturers agree to sell to the Union Sewer Pipe Company, as party of the second part, all the sewer pipe manufactured by the party of the first part between the 15th day of February, 1893, and the 31st day of December, 1900, and to keep in stock at its works a good and sufficient supply of pipe of the various kinds specified in the price list, and to promptly fill all orders of said second party, and to deliver said pipe without delay free on board cars at the works of the first party.

The second party agreed to order said pipe as fast and in such manner as the demands of the market might require. The method of filling and distribution of orders are explicitly stated in the following clause of the contract:

> ("Whereas, the said second party has entered and may hereafter enter into contracts with other manufacturers of sewer pipe for the purchase of sewer pipe, all of whom, together with said first party, are located in Ohio, and are hereinafter called "manufacturers") the said second party in its orders and arrangements for the delivery of pipe aforesaid shall in good faith and as far as practicable in a business way act and be governed as follows, to wit: Beginning February 15, 1893, said first party each succeeding month until July 1, 1893, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in that

respective month as the product of said first party for the month immediately preceding is of the aggregate product of said manufacturers for said preceding month; said first party shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in the six months beginning July 1, 1893, and ending December 31, 1893, both inclusive, as the product of said first party on hand February 15, 1893, and manufactured during the four and a half months, beginning February 15, 1893, and ending June 30, 1893, both inclusive, is of the aggregate product of said manufacturers on hand February 15, 1893, and manufactured during said four and a half months ending June 30, 1893; said first party, in the six months beginning January 1, 1894, and ending June 30, 1894, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in said six months as the product of said first party for the six months, beginning July 1, 1893, and ending December 31, 1893, is of the aggregate product of said manufacturers for said six months; said first party, in the six months, beginning July 1, 1894, and ending December 31, 1894, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in said six months as the product of said first party for the six months beginning January 1, 1894, and ending June 30, 1894, is of the aggregate product of said manufacturers for said six months; for the remaining period of time covered by this contract said first party shall be given such per cent. of the aggregate amount of orders placed by said second party for said remaining period as the product of said first party for the last six months of 1894 is of the aggregate product of said manufacturers for said six months."

Under Article 7 the second party agrees to pay for all pipe delivered under the contract, according to its size and quality, from eight per cent. to fifteen per cent. of the

Western List prices, with its promissory notes, payable in ninety days from the date thereof.

> "And, in addition to the prices above specified said second party further agrees to pay in cash to said first party such a share of any excess that may remain after deducting from the amount realized by said second party for said sewer pipe the prices above specified, and all expense of managing and conducting the affairs and business of said second party, as the amount of sewer pipe delivered by said first party to said second party under this contract shall bear to the whole amount of sewer pipe delivered to said second party by all the manufacturers of sewer pipe under contracts with said second party similar to this contract."

There are several other articles, but immaterial to the defenses interposed in these actions.

The evidence discloses that in the so-called "Akron District" there were six or seven different manufacturers of sewer pipe, but it is not definitely shown how many of these concerns, as a matter of fact, entered into the contract with the defendant in error. But, for the purpose of argument, we will assume that all of the manufacturers of sewer pipe at Akron, respectively, became parties to the contract. The articles and the object and purpose of the incorporation of the defendant in error are not in evidence, but it must be assumed that the Union Sewer Pipe Company had corporate authority under the laws of the State of Ohio to purchase, sell, and deal in sewer pipe.

Plaintiffs in error in the court below urged that the direct and immediate effect of these contracts was to destroy competition, increase prices, and were, as a matter of fact, in restraint of trade, and that by reason thereof plaintiffs in error were greatly injured and damaged in the regular prosecution of their business.

It was said by this court in *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 245, that:

> "All the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain inter-state commerce."

Plaintiffs in error bring to this court by bill of exceptions over 600 typewritten pages of evidence, and the parts printed cover about 177 pages of the transcript. The responsibility for this record containing so large a volume of unnecessary and immaterial evidence must rest with the plaintiffs in error. For the convenience of the court, we file herewith an abstract of the printed evidence offered by the defendant, bearing upon this particular issue, and the plaintiff's evidence in rebuttal.

It was claimed by the plaintiffs in error that during the time in controversy, the pipe manufactured in the "Akron District" differed in quality from pipe manufactured elsewhere and was known, especially in the Chicago market as "Standard Akron pipe," and that as a matter of fact, no other pipe would be received by the municipal authorities of the city of Chicago in the construction of public sewers. In support of their contention, they called as witness David E. Hill, the president, and also other officers of the Union Sewer Pipe Company. All of these witnesses testified that the word "standard" referred to the thickness of the pipe; that some of the firms in Akron adopted the name of "Standard Akron sewer Pipe" with an idea that they had a better grade of pipe than some others. It is also in evidence that during this time there were seventy-five or eighty other companies in the country manufacturing standard pipe of equal quality in all respects with the Akron pipe, and

that some fifteen or twenty other manufacturers were competitors of the defendant in error in the Chicago and other western markets—that the defendant in error did not, and could not, at any time control the market price of sewer pipe, either in Chicago or elsewhere—that the price at all times depended upon the condition of the market.

The undisputed evidence is, that after the organization of the Union Sewer Pipe Company, there was no decrease of production, no closing of factories, and no advance of price. As a matter of fact, from the organization of the company in 1893, covering the entire period in controversy, there was a gradual reduction of the market price of sewer pipe in the Chicago market, and elsewhere. The organization of the Union embraced but a small part of the factories of sewer pipe in the State of Ohio. There was an organization known as the Central Company, controlling many factories on the Ohio river, with annual sales 50 per cent. greater than those of the Union Company. There was also a large manufactory at Columbus, and others located elsewhere. All these companies were competitors of the Union Company in the Chicago market, and were prior to January, 1893. During the entire period there were also several manufactories of sewer pipe in the States of Illinois, Missouri, Minnesota and Michigan, all of which were also competitors in the Chicago market.

The benefits derived under the contracts with the Union Sewer Pipe Company resulted from increased economy in the prosecution of the business of the several manufacturers. There was a reduction in the number of traveling sales agents, clerical employes, and especially

in the amount of stock of manufactured pipe that the parties were theretofore compelled to keep, that they might be enabled to fill any and all orders that they should receive. These matters are explained in detail by the witnesses called on behalf of the defendants.

It was also claimed by the plaintiffs in error that under the specifications issued by the municipal authorities of the City of Chicago, no pipe could be received in the construction of public sewers, except "Standard Akron pipe," but the evidence does not support this claim.

The action against William E. Dee is for the recovery of money due for pipe sold and delivered to him during the month of June, 1896, and it appears from the evidence of William E. Kent, a witness called by the defendants, that he was appointed Commissioner of Public Works of the City of Chicago early in 1895. That believing there was a combination between the sewer pipe dealers and contractors in the city, whereby but one particular brand of pipe should be used, he caused certain tests to be made, which resulted in establishing the fact that there were several brands of pipe in the market at Chicago of equal quality and value for the construction of public sewers, and thereupon he directed that either of such brands of pipe should be received and accepted. This test was made in the summer of 1895, and thereafter the Akron pipe had no advantage over other pipe in the market.

The contracts between the plaintiffs in error and the Union Sewer Pipe Company were executed on the 20th day of August, 1895, and at that time the Akron pipe had no monopoly in the City of Chicago, and certainly none when the pipe in controversy was sold and delivered to the plaintiff in error, William E. Dee.

Relative to the claim against Connolly, and his defense, we repeat that this action was brought upon two promissory notes, the first executed and delivered in December, 1894, and the second in January, 1895. The execution of these notes was admitted, and no defense of failure or partial failure of consideration was interposed. Notices of special defenses and set-off were filed, but there is no evidence in the record that the notes were given for sewer pipe sold and delivered by the payee. The notes were executed prior to the date of the contract between the parties of August, 1895, and the record is entirely silent as to the consideration for which the notes were given.

Plaintiffs in error also claimed that at the date of the contract between the defendant in error and the several manufacturers, they each had a contract with the firm of Camp & Thompson for the delivery of several hundred cars of sewer pipe at 80 per cent. of the Western scale of prices. Plaintiff in error, Dee, claimed that his contract was for 308 cars, but on his direct examination, he testified that he had no agreement with the Union Sewer Pipe Company "in reference to these 308 cars." That after the organization of the Union Sewer Pipe Company he had a conversation with Mr. Hill, the President of the company, relative to the delivery of those cars.

"Q. Was there any talk in that interview about their assuming the contract of Camp & Thompson?

"A. They denied the assumption. Mr. Hill denied the assumption of this contract." (Trans., 151.)

Upon cross-examination, plaintiff in error testified that at the same interview Mr. Hill informed him that he would see Mr. Camp about the contract. That after-

wards, at a subsequent interview, Mr. Hill informed him that Camp denied the contract, and he gave that as a reason for not assuming it.

Plaintiff in error, Connolly, also testified that in December, 1892, he made a contract with Camp & Thompson, for 200 car-loads of city inspected pipe to be delivered during the year 1893 at the price of 80 per cent. off of Western price list, but there is no evidence that the defendant ever assumed this contract. Objections were made by the plaintiff to the admission of this evidence, as being inadmissible under the pleadings. In the notices of special defenses and set-off, no reference is made to these contracts, or to their assumption by the defendant in error, and this part of the defense was practically abandoned.

Out of this evidence, counsel for plaintiffs in error have attempted to build up an unlawful monopoly, prejudicial in its operation to the public interests, and contrary to both the common and statutory law.

Whatever may have been the purpose of the promotors in the organization of the Union Sewer Pipe Company, its existence as a *de jure* corporation, with full authority to purchase, sell and deal in sewer pipe, was not denied by the plaintiffs in error, and this being so, its legal existence cannot be attacked collaterally, either for the purpose of annulling its charter, or for the purpose of depriving it of the protection of the courts, in the possession, use, and enjoyment of its property.

The contracts between these respective parties are in all respects valid and obligatory; the notes are impressed with a sufficient legal consideration, and the sewer pipe in controversy was delivered in accordance with the terms

of the contract of August 15, 1895, except at prices less than the contract price. The contract was entered into more than two years after the organization of the defendant in error, and the plaintiffs in error had full knowledge of the purpose and objects of the incorporation. There was neither fraud nor compulsion in its procurement, and the plaintiff in error, Dee, having received the benefit of the contract, and having accepted and disposed of the pipe sold and delivered to him under and by the terms of the contract, there would seem to be no good reason, either in law or equity, why he should be relieved from payment.

The Circuit Court held that even if it should be found that the defendant in error was in fact a monopoly, and that its contracts with the several manufacturers were invalid under the common law as being in restraint of trade, such fact could not be plead by the defendants in error as a defense to these actions. The court said:

> "The fact that one party to a contract is engaged in illegal acts will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal."

We respectfully submit that the court here announced a correct rule of law, and that there is no evidence in the record that the plaintiff is or was an unlawful combination or monopoly in restraint of trade, contrary to either the common or statutory law.

II.

THE CIRCUIT COURT DID NOT ERR IN SUSTAINING PLAINTIFF'S MOTION TO STRIKE OUT THE DEFENDANTS' NOTICES OF SET-OFF.

(a) Unliquidated damages, growing out of a tort, cannot be set off in an action *ex contractu.*

(b) Defendants' bill of particulars of set-off, filed under order of court, is for treble damages under the Federal Statute of July 2, 1890, and for damages by reason of plaintiff's alleged violation of the Statute of the State of Illinois, of July 1, 1893, defining trusts and conspiracies. (Trans., p. 38.) The claim of such damages is not permissible either as a defense or set-off to the plaintiff's demand.

These are penal statutes, and the rule is, in courts of both state and federal jurisdiction, that in actions for goods sold and delivered, the defendants may set off claims in the nature of assumpsit, but not claims sounding in tort.

In *Robison* v. *Hibbs*, 48 Ill., 408, the court held:

> "That unliquidated damages, growing out of tort, cannot be set off in a suit disconnected with such claim under the statutes."

The action was brought by the plaintiff to recover a balance of account, and the defendant sought to set off damages resulting from alleged trespasses of the appellant's hogs. The court said:

> "We are aware of no law which authorizes the unliquidated damages growing out of a tort to be set off in an action *ex contractu.*"

Nor are such damages subject of recoupment.

In *Hubbard* v. *Rogers,* 64 Ill., 434, the court held that:

> "To be the subject of recoupment, the defendant's claim must arise out of the cause of action involved in the plaintiff's suit."

Again, in another action of assumpsit brought to recover for services and commissions in making sale of certain real estate, it appeared that the plaintiff in negotiating a sale of the lands by authority of the defendant took from the purchaser a mortgage to secure the payment of a part of the purchase money. That the defendant was a non-resident, and that the mortgage was left with the plaintiff to be placed on record. That the plaintiff neglected to have the mortgage recorded until about a year after its execution, and in the meantime certain judgments against the mortgagor became liens upon the property, which the defendant was compelled to discharge. As a defense to the action, he sought to recoup as damages the amount he was compelled to pay.

The court said:

> "We are of the opinion that whatever recovery Evans (the defendant) may be entitled to on account of his alleged damage, must be sought in a distinct suit, and can in no way be set up in the present action, as it is something not growing out of the contract sued upon. To be subject of recoupment, the defendant's claim must arise out of the cause of action involved in the plaintiff's suit."
>
> *Evans* v. *Hughey,* 76 Ill., 115, 120.

And in this court the same rule, so far as we are advised, has always prevailed.

U. S. v. *Buchanan,* 8 How., 84, was an action brought by the United States against Buchanan, who was a pur-

ser in the navy, to recover a balance alleged to be due by him. The defense was that he was entitled to certain credits which accounting officers of the government had refused to allow. The District Judge allowed the evidence given in support of the set-off to go to the jury, but this court held that the District Court "erred in law by permitting a set-off composed of such a claim to go to the jury at all." In passing upon this defense, this court said:

> "The statute of March 3, 1797, which allows set-offs, has had a very liberal construction by this court, extending it to matters even distinct from the cause of action if only such as the defendant is entitled to a credit on, whether equitable or legal. * * *
>
> "The object is to settle between the parties their mutual accounts or debts. * * *
>
> "But any wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. * * *
>
> "This rule prevails when the United States are plaintiffs, as well as individuals."

Also in *Dushane* v. *Benedict*, 120 U. S., 630-48.

This was an action of assumpsit by Benedict, a rag dealer at Pittsburg, Pennsylvania, against Dushane, to recover for rags sold and delivered. The defendants pleaded payment with a notice of special matters of defense, and claimed damages in the sum of $7,000 in excess of the amount sued for by the plaintiff. In the notice of special defense facts were stated tending to show a warranty of the rags on the part of the plaintiff, and also a breach of the warranty, and the defendant claimed the damages resulting from the breach. At the close of the evidence, upon the request of the plaintiff, the court charged the jury, that, "Upon the whole case, the court

instructs the jury to find a verdict for the plaintiff for the amount of his claim." A verdict was returned for the plaintiff in accordance with the instruction and the case was brought to this court by writ of error.

In the opinion of the court, by *Mr. Justice Gray*, the general rules of law and decisions of state courts were considered and reviewed. The court held, that in an action for the price of goods sold or work done, the defendant might set up a breach of warranty or a false representation as to the goods, or a defective performance of the work by way of recoupment of the sum that the plaintiff might recover, but held that, if the defendant "failed to prove a warranty, express or implied, the statute can have no application, because it extends to no claim sounding in tort only, etc."

The Circuit Court applying these thoroughly recognized rules of law to the evidence in the case and to the facts, so far as they are alleged in the special notices of defense and set-off, sustained the plaintiff's motion to strike out, and rejected defendants' claims of set-off, and by so doing, the Circuit Court avoided the error of the District Court in *U. S.* v. *Buchanan, supra.*

III.

THE CIRCUIT COURT DID NOT ERR IN STRIKING OUT THE FIRST, SECOND AND THIRD SPECIAL DEFENSES, INTERPOSED BY THE DEFENDANTS. THEY ARE FATALLY DEFECTIVE IN SUBSTANCE.

The first special defense charges that the plaintiff is a trust or combination of capital and skill of divers persons and corporations, carrying on a commercial business

in the States of Ohio and Illinois, contrary to the common law of said states. With the notices of special defense the defendants also filed "notice of set-offs," but it does not appear that any damages were claimed under the first special defense, or plead as a set-off. Before the trial, the court entered a rule requiring the defendants "to file bill of particulars in support of defendant's plea of set-off," and in accordance with the rule, bill of particulars was filed on the 27th day of September, 1898. (Trans., 14.) Under the first set-off defendants claim treble the amount of actual damages under act of Congress of July 2, 1890.

Under the second, defendants claimed damages by reason of plaintiff's violation of an act of the legislature of the State of Illinois of July 1, 1893.

The third set-off is but a restatement of the second claim of set-off. We therefore assume that claim for damages under the first special defense was abandoned.

However this may be, we insist that the Circuit Court in disposing of the plaintiff's motion to strike out the first special defense, stated the rule of law applicable thereto accurately and concisely.

The court said:

> "As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law, contracts, which are themselves directly in restraint of trade may, in a proceeding based thereon, be declared void and unenforcible by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade, is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other.

> The fact that one party to a contract is engaged in illegal acts, will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal."

This ruling of the court is directly supported in principle by several of the authorities hereafter cited.

The second and third special defenses are stated in the notice as follows:

> "Secondly: That the plaintiff is and at all times since the first day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce among the several states and doing business as such throughout the United States, and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date July 2, 1890, and entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit: sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said Act."
>
> "Thirdly, That the plaintiff is, and at all times since the first day of January, 1893, was a trust, and doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the Legislature of the State of Illinois, entitled 'An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors and prescribing punishment thereof, and matters connected therewith, approved June 20, 1893; in force July 1, 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit: sewer and drainage pipes, sold to defendant by plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof." (Trans., 34.)

We have referred to the transcript of record in the case against Connolly. The record in the case against Dee does not differ in the slightest particular. It will be observed that Connolly claims in his third special defense "that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provision of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof, the same as if he had specially pleaded thereto."

The facts are that the action was not brought against Connolly to recover the price of merchandise, etc., but upon his promissory notes, executed and delivered to the defendant in error.

These notices of special defense were filed under section 28 of the Practice act of the State of Illinois, to wit:

> "The defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense, or may plead the general issue, and give notice in writing, under the same, of the special matters intended to be relied on for a defense on the trial; under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon."

This statute requires the defendant to give notice of the facts that he relies upon as a defense, and these facts must be clearly and explicitly stated; otherwise, the notice is insufficient and may be stricken out by the court. The notice given is not a compliance with this statute; the facts are not stated, but simply the conclusion of the pleader.

This statute has been in force since 1845, and has been brought to the attention of the Supreme Court in very many reported cases.

In *Sherman* v. *Dutch*, 16 Ill., 283 (1855), the Supreme Court said:

> "Notice of special defense, accompanying the general issue, stands in place of a special plea, and fills the same office. If the matter set up by the notice is not a good defense in law, it amounts to nothing; no proof can properly be given under it, and if given, cannot avail the defendant, nor under the general issue and a bad notice, can the defendant give in evidence, in defense of the action, any matter, that by the rules of the common law, should be specially pleaded."

Also in *Hinrichsen & Rothschild* v. *Mudd & Hughes*, 33 Ill., 480, the court held that it was no error for the court to enter an order striking an insufficient notice of a special defense from the files.

The Supreme Court of Illinois has invariably held that a notice of special defense stands in the place of a special plea and in either case, the facts relied upon must be concisely stated, as in *Bailey* v. *Valley National Bank*, 127 Ill., 332.

On page 338, the court said:

> "The purpose of the provision, now the 28th section, was to relieve the defendant of pleading specially new or affirmative matters relied upon as a defense. He is to be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon. The system of common law pleading is repeatedly recognized by the Practice Act, and was the recognized mode of procedure when these provisions were first enacted, and has been so ever since. A plea then had, as it now has, a recognized legal meaning, and

well defined characteristics and requisites, and the several species of pleas performed a well understood legal office. A special plea, introducing new matter, did not deny the plaintiff's cause of action, but set up the defense, by way of confession and avoidance. It is manifest, that by the provisions of section 28, matters of fact constituting a legal defense to the action, instead of being set forth, as at common law, by special plea, may be stated in a notice under the general issue and evidence of such facts given on the trial, with like effect as if the same had been specially pleaded. But although the notice given under the general issue has this effect, no reply, either of admission or denial, of the plaintiff, is required, or permissible thereto, and no issue, either of law or of fact, can be raised thereon. (See *Burgwin* v. *Babcock,* 11 Ill., 28; *Hunt* v. *Weir,* 29 *id.,* 83). If the facts stated in the notice are immaterial, and which, if true, would constitute no legal defense, the plaintiff cannot demur, and thus raise and have determined the question of their sufficiency. All that such notice can be held to do, is to relieve the defendant of the necessity of pleading specially any facts not provable under the general issue, which he may rely upon at the trial, and to introduce evidence in their support, if material and explicitly stated, as if the same had been specially pleaded. The court must determine the materiality of the facts stated, and on the trial, my exclude from the jury, or admit, evidence tending to support the defense."

In *Jones* v. *Albee,* 70 Ill., 34, a suit brought to recover on a promissory note, the defendant filed a special plea of fraud in the procurement of the note, to wit:

> "Defendant avers that the plaintiff caused and procured the defendant to enter into the said agreement, and endorse the said note, and promise as in the said declaration alleged, and the defendant was induced to enter into and make the said agreement and promise, and endorse said note through and by means of the fraud, covin and misrepresentation of the plaintiff, and others in collusion with him."

To this plea a demurrer was filed and sustained by the court. The Supreme Court said:

> "This plea cannot be sustained by any well settled authority on pleading. If the defendant desired to rely on fraud, the facts constituting fraud should have been set out in the plea. This we understand to be a well settled rule of pleading."

In this court, also, the invariable rule is, that in special pleas, facts must be plead instead of conclusions of law, as in *Chicot County* v. *Sherwood,* 148 U. S., 529.

The usual test is, "Would the facts as alleged in the notice have been good upon general demurrer had they been specially pleaded?"

As no facts are alleged in either of the notices, they are fatally defective in substance. The motion to strike out is to be treated as a demurrer, and it would have been error had the court denied the motion.

IV.

IT IS NO DEFENSE TO AN ACTION FOR GOODS SOLD AND DELIVERED, THAT PLAINTIFF IS ALLEGED TO BE AN ILLEGAL TRUST OR COMBINATION TO INTERFERE WITH THE FREEDOM OF TRADE AND COMMERCE, SINCE THE ILLEGALITY OF THE ALLEGED COMBINATION IS COLLATERAL TO THE CONTRACT OF SALE, AND CANNOT TAINT IT WITH ILLEGALITY, OR MAKE IT CONTRARY TO PUBLIC POLICY.

This defense cannot be pleaded either under the common law, or the Federal Statute of 1890, and if permissible at all, it must be under the Illinois statute of 1893, pleaded by the defendants in general terms as a defense.

We shall attempt to show later on that this state statute is invalid, as in contravention of the state and fed-

eral constitutions, and that even if valid, it cannot prejudice the claim of the plaintiff for goods sold and delivered to the defendant in the State of Ohio.

Similar defenses under much stronger evidence than appears in this record have been interposed in other courts, but uniformly rejected. On the trial of the case at bar defendants offered in evidence the case of *Jackson et al.* v. *Brick Association,* 53 Ohio, 303.

This was an action brought by the Akron Brick Association, claiming to be a partnership, against Lyman Jackson *et al.,* as defendants, to recover for certain brick furnished sub-contractors on the order of the defendants.

The defendants denied that the plaintiff was a partnership, and as a defense specifically averred "that said Akron Brick Association, so-called, is not in fact a lawful partnership, but that said alleged partnership is a combination of all or nearly all, of the several brick manufacturers and dealers in and about the City of Akron, and that the object of the copartnership was to control and enhance the price of brick and to prevent and do away with open competition in market."

It will be observed that this was a controversy between citizens of the State of Ohio in a suit brought to recover on a contract for goods sold and delivered within that state, and as a matter of course the laws of the State of Ohio had direct bearing upon the validity of the contract. On the trial the court charged the jury as follows:

> "In our jurisprudence it is no defense to say that the contract was made with a bad man, or with persons engaged in prosecuting acts contrary to law, or the policy of the state, unless the contract grows immediately out of and in connection with an illegal or immoral act. A clear distinction exists in law, as

well as ethics, between a contract entered into to do an unlawful or immoral act, or to promote a course of conduct contrary to the policy of the state, and a contract entered into for a legitimate purpose, though made with persons who commit unlawful and immoral acts, or promote schemes contrary to good policy."

The court directed a verdict, and relative to this direction the Supreme Court said:

> "We see no error in the court deciding the matter, nor in the law as stated by the learned judge: the error consists, as we think, in the application of it."

The Supreme Court, however, held that the plaintiff was not a legal copartnership under the laws and statutes of the State of Ohio, and therefore could not maintain an action in its copartnership name.

The Supreme Court further said:

> "This does not deny to the persons comprising the association the right, in their individual names, to maintain an action for the price of brick sold and delivered to a third person, or the enforcement of any contract that in no way depends upon the illegal arrangement as between themselves."

In this case the court was dealing with a copartnership instead of a corporation organized under and in pursuance of the statutes of that state, and was very careful in its opinion not to relieve the defendants from liability for the goods sold and delivered by the individual members of the copartnership.

Also, in *Norton* v. *Blinn,* 39 Ohio St., 145, it was held that—

> "While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other

> property belonging to his principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction."

Under somewhat different facts, a similar defense was made for goods sold and delivered in Wisconsin, in the case of the *National Distilling Co.* v. *Cream City Importing Company,* 56 N. W. Rep., 864.

The complaint in this action was for a balance due for goods, wares and merchandise, to wit: alcohol, spirits, whisky, etc., sold and delivered to the defendant at its special instance and request. The defendants specially pleaded as a defense that the plaintiff, prior to the sale and delivery of the goods, entered into an agreement with divers firms and corporations residing in different states, for the purpose of forming a trust or conspiracy, for the further purpose of wrongfully interfering with the freedom of trade and commerce, so that it might acquire the full, absolute and complete control and monopoly of all alcohol, spirits and liquors manufactured in the United States, and the exclusive right to regulate, dictate and control the amount manufactured, etc., and that the defendant's business had been greatly injured by reason of said trust and its business methods, and also that the defendants were compelled to pay for all of said goods a price greatly in excess of their real value.

The plaintiff's motion to strike out this defense as irrelevant was denied by the court, with $10 costs. The plaintiff appealed. PINNEY, J., speaking for the court, said:

> "Taking the allegations of the first defense in their most liberal sense, it is apparent that they are irrelevant and have no legal relation to the controversy between the parties to the action, which is whether the plaintiff shall recover the demand set forth in its complaint. * * *

The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and commerce and in restraint thereof and to accomplish the ends therein set forth. * * * Conceding, for the purposes of this case, that the trust or combination in question may be illegal and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust," or "combination," the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

The case was reversed and remanded.

The precise question received the consideration of the Circuit Court of Appeals for the Seventh Circuit in *Dennehy et al.* v. *McNulta,* 86 Fed Rep., 825.

In this case the defendant, McNulta, had been appointed receiver of the Distilling and Cattle Feeding Company, a corporation, organized under the statutes of the State of Illinois. The appellants filed claims for allowance against the funds of the court for the payment of certain rebate certificates or vouchers issued by the Distilling & Cattle Feeding Company to the appellants, aggregating a sum of more than $5,000. There was evidence that the Distilling & Cattle Feeding Company, as organized and conducted, was a combination of a large percentage of the distilleries of the country, asserted to be eighty-five per cent. thereof, constituting an illegal trust monopolizing and controlling the product of the country in that line to the extent of ninety per cent. The Circuit Court of Appeals held that—

> "The mere fact that the corporation as one of the contracting parties, may constitute and unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co.* v. *People,* 156 Ill., 448, cannot serve, *ipso facto,* to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights." Citing *National Distilling Co.* v. *Cream City Importing Co., supra.*
>
> "In the case of an injurious combination of the nature asserted here, the remedy is by well recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

Also in *Brooks* v. *Martin,* 69 U. S., 70, this court held:

> "After a partnership contract confessedly against public policy has been carried out, and the money contributed by one of the parties has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

Planters Bank v. *Union Bank,* 16 Wallace, 483, was an action brought to recover the proceeds of the sale of Confederate Treasury notes and securities, and it was urged in defense that "no lawful or valid obligation could arise from the sale of bonds or securities of the Confederate government."

The court held that—

> "Although an illegal contract will not be enforced by courts, yet it is the doctrine of this court that where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties under a promise express or implied, and the court will not unravel the transaction to discover its origin."

In the Circuit Court the defendants rested their entire defense upon the authority of *Ford* v. *Chicago Milk Shippers' Association,* 155 Ill., 166. In that case the plaintiff was a corporation, organized under the laws of the State of Illinois. All of the producers from whom the City of Chicago received its supply of milk were stockholders and members of the Association, and the object of the Association was to control the price, and the purchase and sale of milk to retail dealers within the limits of the City of Chicago. Ford was a retail dealer within the cor-

porate limits of the city and under contract with the Association received his supply of milk. The action was brought to recover balance of account. The state law of July 1, 1891, by special plea was plead as a defense. The court was dealing with a domestic corporation, and in the opinion said:

> "The rule is settled that corporations created within this state are amenable to the police power, and such bodies are not beyond legislative control, and are amenable to the same extent as natural persons."

Clearly, under this authority the jurisdiction of the court could not be extended to corporations organized in the State of Ohio, nor did the court hold or intimate that a contract executed and practically performed in another state, would not be enforced by the courts of the State of Illinois, by reason of any prohibition of the state statutes.

We assume that it will not be denied by plaintiffs in error that the laws of a state have *proprio vigore* no extra territorial force, or that the contract which is valid where it is made will be held to be valid everywhere. The contract between these parties of August, 1895, provided that the sewer pipe should be delivered to the plaintiff in error free on board of cars at the factories of the defendant in error, located in Akron, to be paid for at a subsequent date. The title to the property became vested in plaintiffs in error at the time of delivery, and they were at liberty to ship it to Chicago or elsewhere as they might elect.

The Milk Association case, *supra,* can be further distinguished from the case at bar in this—in that case the statute of 1891 was plead as a defense and it was the application of that statute to the contract between those

parties that the court considered and held to be a good defense, but in the case at bar the plaintiffs in error based their defense upon the state statute of 1893, and therefore, we insist that the case cited is in no manner controlling.

V.

THE CONTRACTS OF THE DEFENDANT IN ERROR WITH THE SEVERAL MANUFACTURERS OF SEWER PIPE IN THE "DISTRICT OF AKRON," AND WITH THE PLAINTIFFS IN ERROR, RESPECTIVELY, ARE NOT INHIBITED BY THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, ETC."

1. There is nothing in the evidence to indicate any intention to put a restraint on trade or commerce among the several states.

2. It does not appear that any agreements or contracts made by the defendant in error, and relating to the conduct of its business, are in restraint of inter-state commerce.

That the organization of the defendant in error, as disclosed by the evidence, is not a monopoly or restraint prohibited by the act of July 2, 1890, is not now an open question in this court.

U. S. v. *Knight Co.*, 156 U. S., 1, would seem to be not only decisive, but conclusive of this branch of the defense urged by the plaintiffs in error. In the first paragraph of the opinion by *the Chief Justice* it is said that the American Sugar & Refining Company, by reason of its purchases of other refineries, "acquired nearly complete

control of the manufacture of refined sugar within the United States," yet the court held that such monopoly bore "no direct relation to commerce between the states or with foreign nations," and that the act of July 2, 1890, did not forbid "a monopoly in the manufacture of a necessary of life."

And in this opinion it is further said:

> "The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

Also in *Hopkins* v. *U. S.*, 171 U. S., 592, it is said that—

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate."

And in the late case of *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211, while the court held that the direct effect of the agreement or combination under consideration was to regulate interstate commerce, it did not in any particular modify the opinion in the case of *U S.* v.

Knight & Co., supra, but on the contrary cited such case with approval.

The court, speaking by Mr. Justice PECKHAM, said that—

> "Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise, the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance."

Again:

> "It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the *Knight case*—that is, the parties may be engaged as manufacturerers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another state; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided." (p. 246.)

We confidently assert that the present case comes within this ruling.

VI.

THE CONTRACTS BETWEEN PLAINTIFFS AND DEFENDANT IN ERROR IF NOT TO BE REGARDED AS CONTRACTS LOCAL TO THE STATE OF OHIO, ARE INTER-STATE TRANSACTIONS, AND CONSEQUENTLY, NOT SUBJECT TO THE REGULATION OF STATE LAWS.

The contracts involved in these cases were neither made nor performed in the State of Illinois. If the view heretofore advanced that they are local Ohio transactions be not upheld, then they must be regarded as acts of interstate commerce. The evidence shows the general contract of August, 1895 (Transcript, p. 148) was abrogated. The prices to be paid by its terms were uniformly higher than those charged for the goods sued for, as shown by Transcript (pp. 25-29 and 60-61), and admitted to be correct by plaintiff in error. The deliveries were specified to be in the State of Ohio (Transcript, pp. 67-8). No evidence was offered to show the place of making the Connelly notes. In the Dee case, orders for goods were sent by mail from Illinois to Ohio. (Transcript, p. 212.)

Brown v. *Maryland*, 12 W., 446.

MARSHALL, C. J., in this case said:

> "Commerce is intercourse; one of its most ordinary ingredients is traffic."

Cooper Mfg. Co. v. *Ferguson*, 113 U. S., 727.

In this case plaintiff, an Ohio corporation, made a contract in writing in Colorado with defendants, who were citizens of the latter state. It agreed thereby to sell to defendants and deliver f. o. b. cars in Ohio a steam en-

gine for a stipulated price. A Colorado statute required foreign corporations to file a certificate designating their chief place of business, authorized agents, etc., with which requirement plaintiff had not complied. The court, in rendering judgment for plaintiff, held that a single transaction did not constitute "doing business," within the meaning of the state law, and said:

> "We base the conclusion that the demurrer to the defendant's answer should have been sustained upon the interpretation we have given to the Constitution and Statute, and do not find it necessary to decide whether their provisions invade the exclusive right of Congress to regulate commerce among the several states."

Mr. Justice MATHEWS and Mr. Justice BLATCHFORD, in concurring upon different grounds, said:

> "Whatever power may be conceded to a state to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the states; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress.
>
> "In the present case, the construction claimed for the Constitution of Colorado, and the Statute of that State, passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and, to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colo-

rado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling, in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce between the states."

Should the Honorable court take the view here suggested, that these transactions constituted inter-state commerce, then the Illinois Statute would have no bearing, and would be eliminated from the case. It would follow, also, that the Federal Statute and the common law defenses would be wholly irrelevant, since no enforcement of the contracts between defendant in error and the Akron companies is involved. The alleged illegality of these contracts cannot serve to render void contracts which are in themselves valid.

VII.

THE STATUTE OF THE STATE OF ILLINOIS, ENTITLED "AN ACT TO DEFINE TRUSTS AND CONSPIRACIES AGAINST TRADE" APPROVED JUNE 20, 1893, DOES NOT IMPAIR THE VALIDITY OF THE CONTRACT BETWEEN THE PARTIES. THIS STATUTE IS VOID AS BEING IN CONTRAVENTION OF ARTICLE 2, SECTION 2, OF THE CONSTITUTION OF THE STATE OF ILLINOIS OF 1870; also of Section 22 Article 4.

Under the 6th error assigned by plaintiffs in error, this statute is printed in full. (Trans., 248, 49, 50.)

It is alleged that the court erred in ruling "that the Act of July 1, 1893, of the Legislature of the State of Illinois, amendatory and supplemental to the said Act of the General Assembly, entitled, "An Act to provide for the punishment of persons, firms or corporations forming

pools, trusts and combinations and modes of procedure and rules of evidence in such cases," approved June 11, A. D. 1891, and in force July 1, 1891, was unconstitutional and void.

This is the first reference in this record to the statute of 1891. It was not plead as a defense, nor was the court asked to pass upon the validity of this statute. There is nothing in the title or any section of clause of the Act of 1893, to indicate that it was an amendment of the prior statute of 1891. What appears to be a copy of the Act of 1891, was also copied in, presumably with the intention of making it a part of the sixth error. (Trans., 250, 1, 2 and 3.)

The learned counsel were unfortunate in their copy of this statute, evidently taken from one of the older compilations of statutes. If the Act of 1893, is an amendment of the Act of 1891, there is still another amendment, enacted by the legislature in 1897, in the words and figures following, to wit:

> "An Act to amend section one of an act entitled, 'An Act to provide for the punishment of persons, partnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases,' approved June 11, 1891, in force July 1, 1891.'
>
> "SECTION 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That section one of an act entitled 'An Act to provide for the punishment of persons, partnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases,' approved June 11, 1891, in force July 1, 1891, be amended to read as follows: If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this

state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: *Provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this state to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages.* Approved June 10, 1897."

Hurd's Revised Statutes of Illinois (p. 615).

A singular feature of the Act of 1893 is that, while it defines trusts, combinations and conspiracies, it prohibits and forbids nothing. While the validity of certain sections of the anti-trust statute of the State of Illinois of 1891, has been involved in several adjudicated cases, our Supreme Court has not in any case referred to the statute of 1893, or given it any judicial construction. The validity of all these statutes or certain sections thereof, was involved in a case submitted to three of our local judges sitting *en banc*, who concurred in the opinion delivered by Judge Tuley, and while we do not claim that this opinion is a controlling authority in courts of

superior jurisdiction, yet it must be admitted that the legal learning and long experience of the learned judge, entitles his opinion to very great respect.

Speaking of the Statute of 1893, Judge TULEY said:

> "It will be observed as a singular fact that while the Act of 1893 defines trusts and conspiracies, etc., it does not in express terms prohibit the entering into or forming of such trusts or conspiracies. Sections 2, 3, 4 and 5 of this Act prescribe certain penalties for violations of the Act. As nothing is either commanded or prohibited therein, there can be no violation thereof. Except as an Act defining a trust, it is a unique specimen of legislative abortion."

Yet it is upon this act and its alleged violation, that the defendants planted their substantial defense.

Judge Tuley also held that Section 1 of the Act of 1891, as amended, is unconstitutional for the reason, "that it is unequal and partial legislation, which is forbidden at common law, and cannot be sustained upon any principle of right and justice."

If state statutes are the legislative declarations of public policy, it would seem to follow that under these statutes, combinations for the purpose of effecting monopolies, are not contrary to the public policy of the State of Illinois. The original Act of 1891, declared that if any corporations, organized under the laws of this state, or any other state, copartnership or individuals, shall enter into or become a party to any pool, combination, etc., with any other corporation, partnership or individual, to regulate or fix the price of any article of merchandise, etc., they shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment. (Trans. p. 250.)

Section 9 of the Act of 1893 provides that: "The provisions of this Act shall not apply to argicultural products or live stock while in the hands of producer or raiser."

The Act of 1891, as amended in 1897, permits all persons, firms or corporations engaged in mining or the production and manufacture of merchandise to enter into joint arrangements of any kind for the purpose of maintaining or increasing wages. These statutes have not the essential principle of equality, and similar statutes have been uniformly condemned by our Supreme Court, as being prohibited by the Constitution, and forbidden at common law.

Judge Cooley on Constitutional Limitations, says that:

> "Equalities of rights, privileges and capacities, unquestionably should be the aim of the law."
>
> "Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

Cooley's Const. Lim., 6th Ed. p. 484.

Millett v. *The People*, 117 Ill., 294, was a criminal proceeding against Millet, under "An Act to provide for the weighing of coal at the mines, requiring all of the coal produced in the state to be weighed on the scales as provided in Section 1 of the Act, and to keep a record, etc."

The question presented, was whether it was competent for the General Assembly to single out owners and operators of coal mines as a distinct class and provide that they bear burdens not imposed upon other owners of property or employers of laborers, and prohibit them from making contracts which it was competent for other owners of property to make.

The court held that this act was in violation of Section 2, Article 2 of our Constitution, which provides that "No person shall be deprived of life, liberty or property, without due process of law," and further held that "due process of law" in this connection are held to be synonymous with the words "the law of the land," and this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals."

> "Every one," says Cooley (Const. Lim., 2nd Ed., 391), "has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate unrecognized in free governments." (p. 301.)

Also in *Frorer* v. *The People*, 141 Ill., 171, the court held that:

> "It is not competent for the legislature to select operators of mines, or manufacturers, and provide

> that they shall bear burdens not imposed on owners of other property, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make."

To the same effect *Brraceville Coal Co.* v. *People,* 147 Ill., 75; *Ritchie* v. *People,* 155 Ill., 105; *Harding* v. *People,* 160 Ill., 465.

These authorities are conclusive that these trust and conspiracy acts cannot be sustained, because they violate Section 2, Article 2 of the Constitution of the State of Illinois of 1870. It will be observed that there are no exemptions in favor of special classes or combinations under the statute of 1891. It is a part of the history of this legislation that at the time this law took effect, there were many combinations of agriculturists organized for the purpose of maintaining the prices of their products, and for the promotion of their private interests. By these combinations, the Act of 1891 was condemned as destructive of their best interests, and therefore, at the next session of the Legislature in 1893, the Act was amended, exempting from its provisions and burdens all "agricultural products or live stock, while in the hands of producer or raiser."

The farmers can now, like Prince Hatto in the Legend, hold "barns full of grain, the gift of God for the food of man—can refuse to sell it to a starving folk, preferring to hold on for higher prices," without fear of criminal prosecution under either statute.

Under this statute the producers of agricultural products could form corporations or other combinations for maintaining or enhancing the market value of the prime necessaries of life, while the manufacturers of agricultural

machinery and other articles, were denied the same privileges. Thus a combination of a very large per cent. of the people of the State of Illinois for the purpose of carrying out restrictions in trade, or to limit or reduce the production, or increase or reduce the price of merchandise or commodities, was not prohibited, while under the same law, a combination of manufacturers for the same purpose is declared to be a conspiracy against trade to be punished by a fine of not less than $2,000, nor more than $5,000. Apparently, the agriculturalists were content with the law of 1893, but it appears that laborers engaged in mining or manufacturing interests, believed that the statute was a restriction of their rights, and did not afford them equal protection, hence, the amendment to the statute of 1891, providing that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, "it shall not be unlawful for persons, firms or corporations, doing business in this State, to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages."

Here is a distinct unlawful discrimination between manufacturers—it is class legislation of the most vicious kind. It permits, or at least, it does not prohibit a combination of all the manufacturers within the state, providing that the cost of the articles manufactured "is mainly made up of wages," and the principal object of the combination is to maintain or increase wages, but if another class of manufacturers, whose products are not mainly made up of wages, enter into a combination, the purpose of which is to cheapen the cost and maintain the price of their products, this class of manufacturers will be guilty under this statute, of a conspiracy against trade, punishable with a fine of from $2,000 to $5,000.

In *Braceville Coal Co.* v. *People, supra,* it was urged in defense of the statute that it was simply a restriction affecting the corporation only, and it was insisted that this authority was reserved under Section 9 of the General Incorporation Act of the State.

Relative to this contention, the court said:

> "It is expressly held that the reservation of the right to alter, amend or repeal the charter entered into and formed a part of the contract between the State and the corporation chartered under the constitution of 1848, and that the power reserved might be constitutionally exercised (*Butler* v. *Walker,* 80 Ill., 345), and undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by Section 1 of Article II of the Constitution, it is provided: "No corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.' The manifest intention of this provision of the constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special acts, applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section."

Can it be held under these authorities that the conspiracy statutes under consideration are not repugnant to, and prohibited by the Constitution of the State of Illinois?

VIII.

THE STATUTE OF THE STATE OF ILLINOIS OF 1893, AS WELL AS THE STATUTE OF 1891, AS AMENDED IN 1897, IS REPUGNANT TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We have already pointed out wherein these statutes do not preserve "the essential principles of equality"—that they impose restrictions and burdens upon one class of the community, that are not imposed upon other similar classes. If this be true, these statutes, and all other state legislation similar in character and principle, are condemned by repeated decisions of this court.

The precise question was involved in *Barbier* v. *Connolly*, 113 U. S., 27. The case was brought to this court by writ of error to the Superior Court of San Francisco. In the opinion of the court, by Mr. Justice FIELD, it is said:

> "The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the

> same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (p. 31.)

These precise words are quoted and approved in *Yick Wo* v. *Hopkins,* 118 U. S., 367:

In support of this proposition, it is unnecessary to cite other cases. This court has steadily held that the "subject of equality before the law, is a fundamental principle of English and American liberty, which not only has been held sacred in all latter-day constitutions, state and federal, but the principle has been guarded by the courts with jealous watchfulness to see that the citizen may have guaranteed to him this inestimable privilege and condition."

IX.

UNDER ALL THE EVIDENCE AND PROCEEDINGS IN THESE CASES, THE COURT DID NOT ERR IN DIRECTING THE JURY TO RETURN A VERDICT FOR THE PLAINTIFF.

(a) It is shown by the evidence that but six manufacturers of sewer pipe became interested in the organization of the Union Sewer Pipe Company, and entered into contracts for the sale of their product, out of the seventy-five to one hundred corporations and copartnerships engaged in the same business in the several states.

(b) That the product of the six constituent manufacturers was not reduced in quantity, nor was the market price increased.

(c) That the defendant in error did not, and could not, control the market price of the product either in Chicago or elsewhere—there were several other manufacturers in competition with the defendant in error in all the markets.

(d) The contracts between the defendant in error and the manufacturers within the "Akron District," did not operate either in restraint or partial restraint of trade, nor did they amount to a conspiracy between the parties to control prices by creating a monopoly.

If it should be held that the validity of the organization of the Union Sewer Pipe Company, or its contracts with the manufacturers at Akron, are involved in this controversy, then our contention is that such contracts were not invalid, or contrary to public policy.

Oregon Steam Navigation Co. v. *Windsor*, 20 Wallace, 66, was an action brought to recover stipulated damages for the breach of a certain agreement between the parties. In defense it was claimed that the contract was void as being in restraint of trade and against public policy.

Mr. Justice BRADLEY, speaking for the court, laid down the following rule, to wit:

> "It is a well settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made."

And in *Gibbs* v. *Consolidated Gas Co.*, 130 U. S., 396, it is said:

> "Where the public welfare is not involved, and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained."

Dolph v. *Troy Laundry & Machinery Co.*, 28 Fed. Rep., 554.

In this case it appears that parties who were competitors in the business of manufacturing and selling washing machines throughout the United States, and who were the principal but not the only manufacturers in this country, entered into a contract for the purpose of avoiding the consequences of competition with each other and to secure better prices and better profits. The action was brought to recover damages for breach of the contract, the real question being whether such contract was reasonable or unreasonable.

Relative to this defense, Mr. Justice WALLACE said:

> "Assuming that, in entering into the contract, the parties contemplated that the defendant should cease manufacturing machines, and buy all its machines from the plaintiff, and that the only purpose in view was to promote the interests of the parties, and enable them to obtain from customers higher prices for the machines, it is not obvious how such a contract contravenes any principle of public policy. Washing machines, although articles of convenience, are not articles of necessity. The scheme of the parties did not contemplate suppressing the manufacture or sale of machines by others. Those who might be unwilling to pay the prices asked by the parties could find plenty of mechanics to make such machines, and the law of demand and supply would effectually counteract any serious mischief likely to arise from the attempt of the parties to get exor-

bitant prices for their machines. It is quite legitimade for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits. It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other for a specified term. It may happen, as the result of such an arrangement, that the public may have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly. It is hardly necessary to cite authority in support of these propositions, but, if any is needed, enough will be found in the opinions in the cases of *Jones* v. *Lees*, 1 Hurl. & N., 189; *Ainsworth* v. *Bentley*, 14 Wkly. Rep., 630; *Marsh* v. *Russell*, 66 N. Y., 292; and *Perkins* v. *Lyman*, 9 Mass., 522."

Central Shade Roller Co. v. *Cushman*, 143 Mass., 353.

"In that case three manufacturers of patented curtain fixtures, desiring to avoid competition, formed a corporation of which they were the only stockholders. An agreement was executed between this corporation and the three manufacturers, by which the manufacturers gave the corporation the sole right to sell the curtain fixtures for three years, the corporation agreeing to buy at a fixed price all that the manufacturers might make. The manufacturers were to act as selling agents of the corporation and receive a commission. The agreement further provided against any of the manufacturers disposing of their patents or stock in the corporation. This agreement was valid, and one of the manufacturers enjoined from selling on his own account."

The Supreme Court of the State of Illinois adheres to the same rule.

In *Craft* v. *McConoughy*, 79 Ill., 349, the court said:

> "We understand it to be a well settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable."

The same rule in *Lynn* v. *Sibsbee*, 67 Ill., 75.

Brown v. *Rounsavell*, 78 Ill., 589.

This was an action of debt on a penal bond brought by Rounsavell, the defendant in error, against the plaintiff in error, and the obligors in the bond. Hanson and Wolff entered into a contract with Rounsavell by which the latter granted them the right to purchase from him the Etna sewing machine and accessories for sale within the County of Cook. In consideration of the agreement Hanson and Wolff agreed to deal exclusively in Etna sewing machines and accessories sold by Rounsavell, and to purchase their supplies of machines from him; Rounsavell agreed to furnish the machines and accessories at a discount from the Chicago retail prices of thirty per cent. on six months' time. Under this agreement Rounsavell sold and delivered Hanson and Wolff a large number of sewing machines, but they refused to pay for the same as provided in the contract. One of the defenses interposed was that by reason of the restrictions in the contract requiring Hanson and Wolff to deal exclusively in the Etna machines, said contract was in restraint of trade, and therefore, void.

The court said:

> "We see nothing in such a contract so in restraint of trade as to make it in that respect against public policy, and require that it should be adjudged void. We know of no warrant of authority therefor."

The purpose and intention of the promoters and stockholders of the Union Sewer Pipe Company are clearly disclosed by the evidence. The leading officers of the constituent companies were called as witnesses by the plaintiffs in error, and in their evidence there was no concealment of their purpose. The contract was to extend for a period of five years, and provided for the sale of their products. The capacity of the manufactories was not reduced, nor were prices advanced. Their market for the sewer pipe was not confined to any locality or territory, but covered both eastern and western states. Not to exceed twenty per cent. of their product was sold in the Chicago market, and the claim that they had a monopoly of the Chicago market is but a mere pretense, and is contrary to the evidence. The contracts between the defendant in error and the manufacturers were executed in January, 1893, and the evidence is that the market price was not advanced in any market after that date, but, on the contrary, there was a steady and constant decrease of market value. Plaintiffs in error claimed upon the trial that prior to January, 1893, they had contracts with Camp and Thompson for about two hundred and three hundred car loads of pipe, respectively, at seventy-five per cent. of the Western Price List, and that after the organization of the Union Sewer Pipe Company they were compelled to pay that company eighty per cent. of the price list. They claimed that they had been informed by Camp and Thompson that the Union Sewer

Pipe Company had assumed these contracts, but the evidence of their witness, Hill, is that Camp and Thompson denied the contract. If plaintiffs in error had such contracts, Camp and Thompson would have been liable to them for damages resulting from the breach, and their claim should be made against that firm, instead of the defendant in error.

Referring to their contract with the defendant in error (Trans., 176), it appears that they were charged seventy-five per cent. of the price list for only the larger pipe with rings, while the balance of the pipe was sold to them at from eighty to ninety per cent. of the Western Price List. Under the evidence, plaintiffs in error were not damaged by reason of the contract, but, on the contrary, were greatly benefited.

We submit that under the circumstances of the case and the nature of the particular contracts involved in it, the contracts were not unreasonable or invalid as in restraint of trade, nor were they contrary to public policy.

Plaintiffs in error assign in the court below fourteen errors, covering twenty-four pages of the transcript. In the first six they have incorporated what they consider the essential evidence, supplemented by suggestions of argument. We do not understand this to be in accordance with the rules of this court. Plaintiffs in error are required to file a statement of errors, and the evidence is preserved by bill of exceptions; such parts of the evidence as they deem important are printed in the transcript, and thus brought to the court for its consideration.

The fourth error is as follows:

> "The court erred in excluding the deposition of Frank S. Monett, attorney general of the State of Ohio, for the reasons that the said depositions on their face showed that they were taken and certified under the law of the land and the practice of said court, and the said depositions contained testimony relevant to the issues in this case."

Then follows a statement of the learned counsel of the contents of the deposition, or rather, the facts proven by the evidence. These depositions are not printed in the transcript and, therefore, we assume, cannot be considered by the court.

The sixth error (printed seven) charges that the court erred in its charges to the jury. Then follows a copy of the so-called charge. This was the opinion of the court upon plaintiff's motion to direct a verdict; and, after sustaining the motion, the jury was so directed for the reason stated in the opinion and for the additional cause that, under all the evidence and proceedings, the defendants had failed to make good their defense. In this ruling of the Circuit Court, we respectfully submit, there was no error.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
Of Counsel.

Office Supreme Court U. S.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 46

THOMAS CONNOLLY,
Plaintiff in Error,
vs.
UNION SEWER PIPE COMPANY,
Defendant in Error.

WILLIAM E. DEE,
Plaintiff in Error,
vs.
UNION SEWER PIPE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

ABSTRACT OF EVIDENCE.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
of Counsel.

BARNARD & MILLER PRINT.

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ABSTRACT OF EVIDENCE.

TRANS. PAGE.

Evidence of DAVID E. HILL, a witness for the defendant:

62 Q. What is meant by standard Akron pipe in the trade?

A. We manufacture different thicknesses, and standard refers to the thickness of the pipe—standard thickness. Some of the firms in Akron have adopted the name of Standard Akron Sewer Pipe with an idea that they had a better grade of pipe than some others.

The Pennsylvania Sewer Pipe Company and the Crown Fire Clay Company made standard pipe, but never pretended to make standard Akron pipe.

63 There were seventy-five or eighty other companies in the country made standard pipe. The term standard pipe really refers to the thickness of the pipe. They all claim that they make good pipe, and they do make it. I made the subscription to the capital stock of the Union Sewer Pipe Company. I thought it was to the interest of the manufacturers and dealers to subscribe. The manufacturers did not get better prices, but their expenses were far less when combined than when separated. When separate, they sent out as many as fourteen travelling men, and when combined not half that many. It saved book-keeping and office expenses.

64 I never told Dee or Connolly that the manufacturers here (Akron) had formed a pool to control the output of sewer pipe and to limit the sales. I know there was nothing of that kind said to them.

65 During all the time there were other companies competing with us in the market in the State of Illinois. There were three companies in St. Louis, two companies in Red Wing, Minnesota, two companies in Michigan and a number of Ohio river companies. I could name other companies, if I had more time, that compared favorably with the Akron Company. One of them was the second largest company in the United States.

66 I think there were forty other companies that competed with us for the trade in Illinois. All these companies were entirely independent of the Union Sewer Pipe Company. They had no agreement with us, and they regulated their own prices.

67 The principal dealers in Chicago were Williams, Dee and Connolly. Dee and Connolly are the defendants in this case.

68 Under the contract with Dee & Connolly, the pipe was all delivered in Akron. We made no deliveries to them within the State of Illinois. We delivered nothing in Chicago, except to our agencies. Williams was our agent, and his agency terminated about the first of January, 1895.

69 Since July 1, 1896, Mr. Connolly has told me that he would be glad to see a continuation of the business of the Union Sewer Pipe Company. He said the organization of the Union Sewer Pipe Company had a beneficial effect upon his business and its discontinuance was disastrous.

71 During the period from January 1, 1893, to July 1, 1896, Dee and Connolly told me that there was an agreement between the dealers in the city of Chicago as to the prices to be put upon the pipe sold by them.

74 The card of prices had no influence whatsoever upon the price of the pipe. It was a card made years ago by an agreement among the manufacturers, and they have all kept the same card and worked and discounted from the same card. It was not gotten up here in Akron.

Evidence of HORACE B. CAMP, witness called by defendant:

76 Prior to 1893 there was a manufactory of sewer pipe at Cuyahoga Falls, in the Akron District. The pipe manufactured in this district was sold all over the country—in the eastern and western states. In some localities parties would purchase nothing but river pipe, and in others they preferred the Akron pipe. In Chicago, as a general thing, they preferred the Akron pipe.

77 It is not a fact that in 1893 engineers in charge of village and city sewer works near Chicago specified Akron pipe for sewers. Up to the formation of the

union I was by myself, and they objected because we advertised as having Akron pipe. Our factory was five miles from Akron, and our pipe was made of different clay.

78 Our company entered into a contract with the Union Sewer Pipe Company for the handling of all our output of sewer pipe. They were to take all our pipe and pay for it. The price list was used as a basis, and the Union Sewer Pipe Company paid a certain percentage of that list. The profits were pro-rated among all the companies that had contracts with the Union Company.

79 I am familiar with the western card. That settled the gross price of pipe in the western market, but no more so in Chicago and Illinois than in Ohio, Indiana and Michigan.

80 When we made our estimate for the prices that the Union Company should pay, the manufacturers took all the trade in the country as a whole.

81 I had a manufactory of sewer pipe outside of the Union Sewer Pipe Company during all the years from 1893 to the present time. I was a competitor from April, 1893, with the Union Sewer Pipe Company, and my pipe was sold at Chicago as Akron sewer pipe. The Crown Fire Clay Company was treated as being in the Akron district when it was thirty or forty miles away. The principal owner lived in Akron.

84 During the time I was connected with the union, the price of pipe was governed by the trade. Mr. Hill was president of the company, but did not decide at what prices the pipe should be sold. The state of the market decided the prices. The Union Sewer Pipe Company was organized in February, 1893. In 1892 and '3 quite a large per cent.

of the ring pipe was manufactured for the Chicago market, but later on they got to doing it in the eastern states.

87 During that time, I should judge that twenty-five to thirty per cent. of this kind of pipe was sold to the Chicago dealers. Mr. Connolly, Dee and Williams were the principal dealers. The chief consumption of the Akron pipe was in the New England states. Previous to the formation of the Union Company, Mr. Dee and his father had been customers of ours for quite a number of years. We were, perhaps, furnishing them more pipe than any one else up to 1892. After that the National Sewer Pipe Company furnished them the most. After the formation of the Union Sewer Pipe Company, the H. B. Camp Company, of Greentown, furnished them pipe directly, without the intervention of the Union Sewer Pipe Company.

91 We frequently came to the relief of Mr. Dee during the years 1894 and 1895. What is known as city pipe was made at my private factory at Greentown, and by the Central Company and by a good many other companies. If a Chicago dealer was unable to obtain sewer pipe from the Union Sewer Pipe Company, I know of no reason why he could not have obtained it from other companies, except that the Chicago dealers had less trouble in getting Akron pipe accepted than other pipe. I think many of the specifications for sewer pipe in Chicago called for Akron pipe or pipe of equal quality. During this time Dee and Connolly could have obtained city pipe for Chicago from Red Wing, from Columbus, Ohio, and from the Central Company, and also from H. B. Camp & Company. The sales of the Central Company were fifty per cent. greater than the sales of the Union Sewer

pipe Company. I think the pipe of the Central Company was the best pipe.

94 The Central Company was an organization formed for the purpose of dealing in pipe and buying and selling the pipe manufactured on the Ohio river. It had contracts with manufacturers similar to the contracts of the Union Sewer Pipe Company.

95 The contracts between the Union Sewer Pipe Company and manufacturers and between the Central Company and manufacturers did not substantially cover the field of sewer pipe manufactories in the State of Ohio. I know of three that were not included, and, I think, a good many more.

96 Other manufactories in the north-west manufactured what is known as city pipe. I was shown some of this pipe by Mr. Dee, and he told me that it was made in the north-west. He told me that he bought it at Red Wing.

97 Between January, 1893, and July, 1896, there were numerous companies competing with me for the Illinois market. These other companies included the Columbus Sewer Pipe Company; two at New Brighton, Pennsylvania; two at Red Wing. There was also more or less pipe from St. Louis, White Hall and the Brazil Company, and Thomas Connolly was making pipe at that time. It is a fact that during that time the defendant, Connolly, was one of my competitors as a pipe manufacturer.

98 The Union Sewer Pipe Company, after its organization, did not control the price of pipe. It did not control the prices of my pipe after the 1st of April, 1893. One of the objects of the organization of the Union Sewer Pipe Company was to economize expenses of operation.

100 It requires less traveling men. "There are other advant-

ages; for instance: if we got an order that some parts of it were lacking at the shop, we could load it in part and ship to any of the other factories to fill it and go on. We could not do that until the organization of the company."

"There are more than 500 different shapes of sewer pipes made. My experience—in running through the winter months, I supposed I had a stock of everything on hand which was likely first to be ordered in the spring, but just as likely they would call for something we have not got, but working together in this way some of us would have it. If we had been on our own hook we either had to lose the order or induce the people to wait. The feeling of the people was such that they would not accommodate one another at all before the union was formed, and this was certainly a benefit to the dealers." Prices in the Chicago market have been growing lower ever since the formation of the union. The price of pipe sold by the Union Company was lower as they had to continually meet competition.

102 The Union Sewer Pipe Company had 50 or 60 competitors in the United States. There are about 100 manufactories, but a good many of them are not competitors. There were 15 or 20 competitors in the State of Illinois. I have no interest in the result of these suits.

Evidence of JOSEPH A. BALDWIN, a witness for the defendant:

103 I have been in the manufacture of sewer pipe for more than twenty years. From January, 1893 to July, 1896, there were competitors of the Union Sewer Pipe Company in the Illinois and Chicago markets. There were some in Ohio.

There were two companies in the vicinity of Columbus, Ohio, and two or three at St. Louis; one at Utica; two or three on the river and one north of Chicago. I don't know just how many were competitors. There was no understanding or agreement to my knowledge between the Union Sewer Pipe Company and these competing companies as to prices.

109 During the years 1893 and 1896 I suppose there were 75 or 100 manufacturing establishments in the country, but I do not know how many of them reached the Chicago market, but there were several in Illinois, Missouri and Michigan, and perhaps some in Indiana.

Evidence of HARRY THOMPSON, a witness for the defendant:

109 I am generally familiar with the details of the sewer pipe business both in manufacturing and selling. During the existence of the Union Sewer Pipe Company the Red Wing of Minnesota, Brazil Sewer Pipe Company, two or three in St. Louis and several others were competitors of the Union Sewer Pipe Company in the Chicago market. These companies had no arrangements with the Union Sewer Pipe Company regulating prices in the Chicago or other markets. With all these other competing companies the Union Sewer Pipe Company could not control the prices.

118 The Union Sewer Pipe Company, after its organization did not advance the price of pipe in the Chicago market. I think it gradually went lower all the time.

Evidence of Ed. M. Buel, a witness for the defendant:

120 This witness testified that the Union Sewer Pipe Company had competitors in the Chicago market from 1893 to 1896, naming the same competitors as the preceding witnesses.

126 During the last five or six years other companies competed with the Union Company in the Chicago market for the sale of sewer pipe, and I think their ability to do so has been increasing during the last five or six years.

127 During the last three or four years the makers of other pipes have been able without difficulty to get into the Chicago market.

Cross-Examination of

138 Defendant's witness, Henry J. McNichols:

I was Chief Inspector of sewer pipe of the City of Chicago during the years 1893-5 and 6. By standard Akron pipe I mean that the pipe must be smooth, hard burned, well vitrified and it must be of standard thickness.

139 The specifications called for standard pipe and standard pipe had a definite meaning.

Cross-Examination of

Defendant, William E. Dee:

158 Q. Now, from 1893 down to 1896 you were still, you say engaged in the same business. What brands of pipe did you handle during those years? A. Camp & Thompson and National Sewer Pipe. A few cars we had, I think, from the Akron Sewer Pipe Company. Probably some from the Crown. I handled a few cars of Columbus pipe, and I handled pipe manufactured at Brazil, Indiana.

159 I handled pipe from other manufactories, from places outside the city of Chicago, but not in the city.

160 I am certain that for main sewers constructed in Chicago specifications called for Akron Standard pipe. I think it was previous to 1890. In 1893 I am sure it was "Akron or its equal." "Akron or its equal" were in the specifications.

166 I have referred to a conversation had with Mr. Hill relative to my contract with Camp and Thompson. Mr. Hill said that he would see Mr. Camp about it. At a later interview he told me he had seen Mr. Camp and that Camp denied the contract and this he gave as a reason for not assuming the contract.

Mr. WILLIAM D. KENT, defendant's witness, testified:

168 That he was appointed Commissioner of Public Works in the City of Chicago in the year 1895 and continued in office until the 20th day of July or August, 1896. The department of sewers is a sub-branch of the department of public works.

169 I know something about Standard Akron pipe. It was used in the building of new sewers in the City of Chicago. Specifications were issued showing that nothing but Akon pipe was to be used. This was practically so when I became Commissioner of Public Works. From the experience I gained as a member of the council I was of the opinion that there was a combine among the sewer builders and the manufacturers of sewer pipe, so that I gave directions for a list of the different kinds of sewer pipes and the names of the manufacturers, so that we could make tests of the different kinds manufactured. I sent samples to the Illinois University at Champaign, and instructed the professors there to have tests made. Each sample bore a different number, and they reported the results of the tests to us by number. I instructed them that

we wanted to have no pipe that was not absolutely perfect and they returned as the result of their tests seven or eight pipes of different manufacture reported favorably upon as being absolutely perfect and safe and the balance they rejected. I then instructed the sewer department not to allow in any of the pipe that had been rejected, but that any that had passed the tests that I had ordered made could be accepted by the contractors and that any one in the sewer business could use them in the city's work under their contracts. This was during the summer of 1895.

P. M. FINSTHWAIT, defendant's witness, testified:

171 I am at present Sewer Inspector for the City of Chicago, and have been since 1887, except from July, 1895, to 1897. My duties are and were to inspect pipe for the main sewers.

172 No pipe has been placed in the sewers during my term that has not passed my examination and inspection. "Standard Akron pipe" means round, straight, proper thickness, vitrified and glazed. It does not mean pipe manufactured in any particular locality, and the phrase "Standard Akron pipe" was never in the specifications since I was a sewer inspector.

Evidence of THOMAS CONNOLLY, defendant:

185 The standard Akron pipe is no better than any other pipe. Not a bit. I have been in the pipe business, manufacturing pipe from 1868 and know something about what pipe is. I say there is a good pipe in the market and always has been. It was always a matter of test. There has always been as good pipe in other markets, and I have sold it myself in Buffalo, Pittsburg and other markets. Prior

to 1893 I sold lots of other pipe in the market at Chicago.

186 Akron pipe has been rejected because the word Akron was not stamped upon it. The inspection depended a good deal upon how we treated the inspectors.

Q. So if the dealers in the Akron pipe treated them kindly the Akron pipe would pass inspection? A. The Akron folks had not to treat them; it was the dealers here that had to treat them. We had to do this, and could not get along very well without it.

BYRON W. ROBINSON, witness called on behalf of the plaintiff:

194 Other manufacturers deny that the Akron pipe has any special virtue. There are other factories manufacturing substantially the same quality of pipe at various points in Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York. The factories that make what is known as shale pipe that I am acquainted with, are as follows:

The Chicago Sewer Pipe Company, Brazil, Indiana; The Streator Manufacturing Company, Streator, Illinois; Monmouth Mining and Manufacturing Company at Monmouth, Ills.; Bennett Sewer Pipe Co., at Jackson, Michigan; The Macomb Sewer Pipe Company, at Macomb, Illinois; the Columbus Sewer Pipe Company, at Columbus, Ohio; The Sharon Clay Manufacturing Company, of Sharon, Pennsylvania; The Standard Sewer Pipe Company, of Rochester, N. Y.; Otis & Gores, of Rochester. There may be others, but I don't recollect them now.

195 All these factories have a substantial capacity. The Columbus factory has a capacity of about a thousand carloads per annum. All these factories manufacture this sewer pipe from shale, and place it upon the market in

this vicinity and in the Ohio market. From 1890 down to 1896 four or five of the factories I have named marketed pipe in Chicago, more or less. The pipe was in the market and for sale.

196 I do not think there was any substantial difference in the quality of the goods manufactured by these different companies or in the value of the goods manufactured. The Camp and Thompson pipe was perhaps a little inferior, and always sold for a little lower price than the market value of the Akron pipe.

197 All of the companies that entered into contract with the Union Sewer Pipe Company continued to prosecute the work of manufacturing sewer pipe after the contract was made. Since the date of that contract there has been a large increase in the output of these factories. There was not any time a decrease, nor did any of the factories close.

During the year 1893 the price was seventy-five off city inspected ring pipe, but the price was gradually reduced until in 1896 we were selling at eighty-two off. There was a gradual reduction in the price of pipe from 1893 to 1896.

198 There was sharp competition between the companies that I have named and the Union Sewer Pipe Company in the market at Chicago, prior to and since 1893. Some of these companies had a lower rate of freight than we had. In the market at Chicago we had to compete with these companies and sell at the same rates or price. There was no change in the general conditions after the organization of the Union Sewer Pipe Company. The Union Sewer Pipe Company, after 1893, had to meet the same conditions in competition as the constituent companies prior to that time.

200 After the organization of the Union Sewer Pipe Company, the supply of sewer pipe was not diminished.

201 After the fall of 1896, after the Union Sewer Pipe Company had gone out of business, I had a conversation with Mr. Dee in his office in Chicago, in which he said he was sorry the Union Company quit doing business. After the organizattion of the Union Sewer Pipe Company, I think about 20 per cent. of the product of the Akron mills was sold in the Chicago market. The rest found other markets in the country.

WILLIAM A. HUMPHREYS, on rebuttal, testified:

213 From the 1st of January, 1893, to the 1st of October, 1899, I was connected with the Columbus Sewer Pipe Company at Columbus, Ohio. That company was engaged in the manufacture of sewer pipe. The Columbus Company's pipe is of the same quality as the Akron Sewer pipe; there is no difference in it to my knowledge. It is the same clay—shale clay.

214 During all the time from 1893 until the present time the Columbus pipe has been used in the City of Chicago by contractors in the construction of sewers. About one-third of the sales in this city was of the Columbus pipe. About 75 car-loads per year were sold for main sewers.

215 There were no more rejections of the Columbus pipe than of the Akron pipe by the sewer inspectors. They never objected to our pipe because it was not standard Akron pipe. When they rejected a piece of our pipe another piece of the same was substituted. They only rejected defective pipe.

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